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LAND COVENANTS IN PENNSYLVANIA

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The law in Pennsylvania relating to land covenants differs in several important ways from that in other states. From the earliest days, law and equity were so blended that many of the technical rules of the common law have never been applied. The creation of a covenant of warranty by statute was another departure; and in relieving purchasers of land from payment on the discovery of defects in the title and encumbrances, "the courts have gone further," said Justice Woodward,¹ "than in any other state or country where the common law obtains." Lastly, the conveyance of land by a party not in possession and held adversely by another—a principle founded on an English statute against the sale of pretended titles—which prevails in many states, forms no part of the land law of Pennsylvania.

We may begin with the inquiry, what is a covenant? On several occasions the courts have said that whatever shows the intention of the parties to bind themselves to perform the thing stipulated may be deemed a covenant without regard to the form of expression.² Even a recital that something is intended to be

¹ *Beauplaud v. McKeen*, 28 Pa. 124, 130 (1857).

² *Taylor v. Preston*, 79 Pa. 436 (1875); *Waslee v. Rossman*, 231 Pa. 219, 227, 80 Atl. 643 (1911).

done amounts to a covenant to do that thing.³ But a writing in the form of a deed, though in fact a will, containing a covenant or warranty, is not a covenant.⁴

A more complete conception of a covenant has been given by Chief Justice Sterrett.

"Neither express words of covenant nor any particular technical words, nor any special form of words, is necessary to charge a party with covenant. Any words showing the intent of the parties to do or not to do a certain thing raise an express covenant. No special words are necessary to make a covenant that will run with the land. Words of *proviso* and condition will be construed into words of covenant where such is the apparent intention and meaning of the parties."⁵

And when words can be construed either as a condition, reservation or covenant, the latter construction is favored.⁶ In applying this general rule, a covenant of general warranty of all and singular the hereditaments and premises described in a deed, which conveyed real estate and gas with their connections and appliances, applied only to the title of the real estate conveyed.⁷

To create a covenant the deed must be signed by both parties. "How it came to be thought by the profession at an early day," said Chief Justice Gibson, "and to be handed down to the present, that an action might be maintained against the grantee in a deed-poll under any circumstances, or against anyone who had not sealed it, I cannot imagine."⁸ A poll-deed, however, which is accepted by the grantee becomes the mutual act of the parties, as

³ *Christine v. Whitehall*, 16 S. & R. 98 (1827); *Penn v. Preston*, 2 Pa. 14 (1829); *Campbell v. Shrum*, 3 W. 60 (Pa. 1834); *Tryon v. Munson*, 77 Pa. 250 (1874); *Truitt v. Spotts*, 87 Pa. 339 (1878); *Mentz v. Whitcomb*, 40 Pa. Super. 553 (1909).

⁴ *Scott v. Scott*, 70 Pa. 244 (1871).

⁵ *Electric City Land and Imp. Co. v. Coal Co.*, 187 Pa. 500, 511, 41 Atl. 458 (1898).

⁶ *Paschall v. Passman*, 15 Pa. 295 (1850); *McKnight v. Kreutz*, 51 Pa. 232 (1866); *First Methodist Church v. Old Colo. Public Ground Co.*, 103 Pa. 608 (1883); *Dempwolf v. Greybill*, 213 Pa. 163, 62 Atl. 645 (1906).

⁷ *Beale v. Jennings*, 129 Pa. 619, 18 Atl. 550 (1889).

⁸ *Maule v. Weaver*, 7 Pa. 329 (1847).

much so as if signed by both,⁹ and the covenant thereby created runs with the land.¹⁰ Again, if one is not liable on a deed-poll in an action of covenant from lack of his seal, he is liable in *assumpsit*.¹¹

On many occasions after an agreement has been made for conveying land, the question has arisen whether the deed made and presented by the grantor was a sufficient compliance with the agreement. Thus a covenant to convey in fee simple is satisfied with a special warranty, in other words, the warranty implied by the Act of 1715.¹² Also, a covenant to convey by a good warranty deed in fee simple implies an obligation on the part of the vendor to procure a patent for the land.¹³ In popular phrase a warranty deed is one with a special warranty, and a covenant which requires "a good and lawful deed of conveyance clear of all incumbrances," is satisfied by a deed of special warranty.¹⁴ And such a deed suffices where the parties have expressed their meaning to be only "a warranty deed subject to all the demands of the Commonwealth."¹⁵ Generally the purchaser of land in fee simple is not entitled to anything more than a covenant against the acts of the grantor and his heirs, that is, a covenant of special warranty.¹⁶ When, therefore, such a deed is given, and the title to the land proves defective, and an action is brought to recover therefor, parol evidence is inadmissible to support the allegation of the vendor that the vendee had bought at his own risk, for the covenant cannot thus be destroyed.¹⁷ And if the vendor at the time of the conveyance knew of the interest of others in the

⁹ *Blood v. Crew-Levick Co.*, 177 Pa. 606, 35 Atl. 871 (1896); *Reedy v. Nypano Co.*, 250 Pa. 251, 95 Atl. 427 (1915). This is the prevailing rule. For cases see 126 Am. St. Rep. 348 (1909).

¹⁰ *Kelly v. Nypano Co.*, 200 Pa. 229, 49 Atl. 779 (1901).

¹¹ *Madore's Appeal*, 129 Pa. 15, 22, 17 Atl. 804 (1889).

¹² *Espy v. Anderson*, 14 Pa. 308 (1850).

¹³ *Le Ray De Chaumont v. Forsythe*, 2 P. & W. 507 (Pa. 1831).

¹⁴ *Withers v. Baird*, 7 W. 227 (Pa. 1838).

¹⁵ *Ibid.*

¹⁶ *Withers v. Baird*, 7 W. 227, 229 (Pa. 1838); *Espy v. Anderson*, *supra* note 12; *Cadwalader v. Tyson*, 37 Pa. 322 (1860); *Loyd v. Farrell*, 48 Pa. 78 (1864).

¹⁷ *Supra* note 16.

land, he could not bind his vendee who was ignorant; on the other hand, concealment of his knowledge was a fraud.¹⁸

If one who has an inchoate or imperfect title to land conveys it to another by deed of general warranty, and subsequently acquires a good title to it, this will inure to the benefit of his vendee.¹⁹ Nor can he elect to reject the new title and recover the consideration money paid in an action for breach of covenant of seisin. He is, however, entitled to compensation for whatever damages he may have sustained.²⁰ Likewise the grantor in a general warranty deed is bound by his warranty, and cannot, as against the grantee, acquire title to the land in a proceeding on a mortgage which was a lien thereon at the date of the deed.²¹

Does the covenant include a thing not *in esse*? This question has been thus answered.²² Where the covenant extends to a thing *in esse*, for example, to repair a house, the thing to be done by force of the covenant is annexed and appurtenant to the thing demised, and goes with the land and binds the assignee, though he is not bound by express words.²³ But where the covenant extends to a thing not in being, for example, to build a house on the land demised, the covenant does not run.²⁴ If the covenant or condition affect a thing *in esse*, parcel of the demise, it is immediately affixed to the estate and binds assigns, whether they are named by the lessor or not.²⁵ Thus an agreement to pay rent in all cases binds the assignee.²⁶

From time to time a warrantor's authority to give a deed of warranty has been questioned. Thus a tenant by the curtesy cannot deprive heirs by conveying the land to another, for they are protected by the ancient *Statute of Gloucester*, which is a part

¹⁸ *Ibid.*

¹⁹ *Logan v. Neill*, 128 Pa. 457 (1889); *Midland Mining Co. v. Lehigh Valley Coal Co.*, 136 Pa. 444, 20 Atl. 634 (1890).

²⁰ *Knowles v. Kennedy*, 82 Pa. 446 (1876).

²¹ *Waslee v. Rossman*, *supra* note 2.

²² See *Fisher v. Lewis*, 1 Clark 422 (Pa. 1843).

²³ *Pollard v. Shaffer*, 1 Dall. 210, 211 (U. S. 1787); *Cathcart v. Bowman*, 5 Pa. 317, 319 (1847).

²⁴ *Cathcart v. Bowman*, *supra* note 23.

²⁵ *Jones v. Gundrim*, 3 W. & S. 531, 533 (Pa. 1842).

²⁶ *Ibid.*

of the law of Pennsylvania. By this statute it is provided that if a tenant by the curtesy aliens with warranty and dies, the heir is not thereby barred unless he had assets in fee simple by descent from the tenant of the curtesy; and if lands or tenements thus descended to the heir, he was barred, having regard to the value thereof. There has been an interesting application of the statute in which *A*, a tenant by the curtesy, conveyed land to *B*, the deed purporting to convey the fee with the covenant of general warranty. Afterward *A* executed an agreement to *C* and *D*, who were entitled to the fee of the alienated premises, as heirs of his deceased wife, in which, after executing a deed of release without consideration by *C* and *D* for certain of the lands to which they were entitled as heirs of their mother, he covenanted that he would not mortgage, sell, or otherwise prejudice their rights as his heirs at law of their free and equal share of his estate. Subsequently, he made a will directing the equal division of his estate among his heirs. After his death *C* and *D*, who took assets to greater value than the land conveyed to *B*, sought to eject *B* from it. The court held that at *A*'s death his heirs took his realty as heirs by the agreement, and that the land thus taken must be regarded as assets belonging to them derived from their ancestor, which estopped them from denying the covenant of warranty made by him in his deed to *B*.²⁷

The authority of a wife who joins in a general warranty deed with her husband for conveying land belonging to him and also her right of dower, has been questioned. Nevertheless, she is bound by such a covenant, nor can she acquire title to the land in proceedings on a mortgage which was a lien thereon at the time of executing the deed of warranty and so set up a title against the grantee. By the *Act of June, 1893*, the capacity of a married woman to act became the rule; her incapacity the exception. This was limited to the mortgaging or conveying of her real estate unless her husband was joined, and to endorsing and guaranteeing notes for others. "Except as so limited," says Justice Brown, "she may do what her husband can do, and when

²⁷ *Carson v. New Bellevue Cemetery Co.*, 104 Pa. 575 (1883).

she does what she has power to do, she is bound by her act.”²⁸ Moreover, as school districts have only such powers as are conferred on them by statute, they have no statutory authority either express or implied to convey in fee property acquired by eminent domain, nor enter into a covenant of general warranty made with the vendee.²⁹

The way is now clear for describing the different kinds of warranties. Of these the first is a general warranty. In England the covenant of warranty in the feudal days authorized the vassal to demand of his lord to warrant and defend his gift, and if he failed to do so and the vassal was evicted, the lord was bound to give him another feud of equal value. At a later period a different method was adopted of inserting in deeds of conveyance covenants for title. This insertion has been ascribed to Sir Orlando Bridgman, an eminent conveyancer in Cromwell's time. “The various intentions of parties,” says Platt, “and the facility with which they were accommodated to the circumstances connected with titles, soon occasioned their general use in practice.”³⁰

Of these covenants for title, there are five: (1) that the vendor is seised in fee; (2) that he has a good right to convey; (3) that the purchaser and his assigns shall quietly enjoy; (4) for indemnity against encumbrances; (5) and for further assurance.³¹ Besides these is the general covenant of warranty. The distinction between this and the ancient covenant of warranty is set forth by Chief Justice Gibson.

“The modern covenant of warranty differs from the ancient warranty, not because the latter bound the feoffer to defend the land, but because it bound him to render, not damages, but a recompense in kind for a breach of it. The form of the writ, as well as the nature of the recompense

²⁸ *Hagenbuch v. Phillips*, 112 Pa. 284, 3 Atl. 788 (1886); *Kuhn v. Ogilvie*, 178 Pa. 303, 35 Atl. 957 (1896); *George v. Brandon*, 214 Pa. 623, 627, 64 Atl. 371 (1906).

²⁹ *School District v. Fess*, 98 Pa. 600, 606 (1883); *Mulligan v. School District*, 241 Pa. 204, 88 Atl. 362 (1913).

³⁰ PLATT, COVENANTS (1829) 304.

³¹ *Patten v. M'Farlane*, 3 P. & W. 419, 422 (Pa. 1832).

in value, was different; but the measure of the obligation was the same. The feoffer was bound by his warranty to defend the land; the grantor is bound by his covenant to do as much, and no more, by defending the grantee from eviction on a superior title. By reason of its straitness, even the modern covenant of warranty has given place in English conveyances to the common covenants for title against particular defects which it does not reach. In Pennsylvania, it has been retained by unprofessed scriveners as a nostrum supposed to contain the virtue of the whole five; but its potency has not been recognized by the bench. The writ of *warrantia chartæ* was founded on an assize, or a writ of entry in the nature of an assize, brought against the feoffer, and the covenant of the feoffer was to warrant the land by defending the action—the modern writ of covenant is brought against the grantor to recover damages for a failure to do so. The gravamen, therefore, is not the defect of title, but the eviction consequent on it.”³²

In *Patten v. McFarlane*,³³ Justice Kennedy has explained the difference between the covenant of general warranty and the other covenants. The covenant of general warranty may be considered either as a covenant of *seisin*, of good right to convey, of quiet enjoyment, against encumbrances, or further assurance, as may best suit the wishes of the vendee. It was the inaptitude of the covenant of general warranty to accommodate itself to the intention of parties, that gave rise to the special covenants above mentioned and recommended them to general use.

“Consequently the propriety of introducing a general warranty on one or more of the special covenants, and which of them, must always depend upon the agreement of the parties, and the particular circumstances under which the conveyances are to be made. The man who considers himself the absolute owner of the estate in fee simple which he is about to sell and convey, and considers himself also as receiving a price for it that will indemnify him for doing so, will annex all those five covenants to his deed of conveyance. All, however, cannot be necessary in any case. If

³² *Stewart v. West*, 14 Pa. 336, 338 (1850). See *Strong v. Nesbitt*, 267 Pa. 294, 110 Atl. 250 (1920).

³³ *Supra* note 31.

the covenant of seisin be inserted, it implies a power and good right to convey; therefore this last need not be annexed. But a man may have a power and authority to sell and convey an estate in fee, without being seised himself, and in such case it would be proper enough for him in his deed of conveyance to covenant for his having full power and good right to convey; although it would be inappropriate as well as indiscreet in him to covenant likewise that he was seised; because if he did, it would be a covenant broken as soon as made, upon which he might be sued, although the vendee was invested by the deed of conveyance which was made to him with a perfectly good title in fee simple."

In *Knepper v. Kurtz*,³⁴ Judge King, whose opinion was affirmed on appeal, said in the court below:

"Outside of the legal profession, this covenant is regarded as the panacea for every defect that can be alleged against the title of the grantor, and scriveners, especially in the rural districts, rarely think of the necessity for any other. There is, however, a very broad distinction between a covenant of general warranty and a covenant against encumbrances. In the latter, where encumbrances exist, the covenant is broken as soon as entered into, while in the former, the covenant is broken only by an eviction."

In some states the view is maintained that the five covenants are all included in the general warranty. "I can say with truth," says Justice Lumpkin of the Supreme Court of Georgia, "after a practice of more than a quarter of a century, that I never saw a deed containing in so many words definite and precise covenants of seisin, right to convey, for quiet enjoyment, against encumbrances, and for further assurance. These are all designed to be included in the general covenant of warranty of title against all claims." ³⁵

³⁴ 58 Pa. 480, 482 (1868).

³⁵ *Leary v. Durham*, 4 Ga. 593, 601 (1848); *Eli v. Trent*, 195 Ky. 26, 241 S. W. 324 (1922); *Green v. Irving*, 54 Miss. 450, 454 (1877); *Jeter v. Glenn*, 9 Rich. 374 (S. C. 1856).

"A general warranty, therefore," says Justice Agnew, "is a real covenant descending with the title and passes to the assigns by express terms."³⁶ Moreover, whatever else it may be, it is a covenant against eviction; runs with the land and is not broken until there has been an actual or constructive eviction under a paramount title.³⁷ "The covenant protects only against an ouster from the possession."³⁸ The right of action accrues when eviction actual or constructive occurs.³⁹ The covenantee need not wait to be actually turned out by legal process, for he may surrender when the results are plainly inevitable.⁴⁰ But to "sustain an action upon a covenant of warranty there must be either an actual or constructive eviction by title paramount."⁴¹ A judgment in ejectment by itself is not sufficient.⁴² Nor is the opening of a public highway by exercising the right of eminent domain an eviction.⁴³ "All the cases agree," says Justice Sharswood, "that there must be a change of possession." But a different rule applies in an action to recover unpaid purchase money.⁴⁴

How far is the warrantor's possession essential to the validity of his warranty? If he is in actual possession of the land, then his covenant runs with it and descends to his heirs and assigns. But if he was not in possession at the time of making his covenant, then the continuance of it to the assignees has long agitated the judicial mind. Confining our inquiry to American tribunals, one of the cases we find most frequently cited and clearly stating the extreme view is *Slater v. Rawson*.⁴⁵ "To support an action by an assignee in the covenant of warranty,"

³⁶ *Susquehanna, etc., Coal Co. v. Quick*, 61 Pa. 328, 339 (1869).

³⁷ *Williams v. O'Donnell*, 225 Pa. 321, 74 Atl. 205 (1909); *Herbert v. Northern Trust Co.*, 269 Pa. 306, 313, 112 Atl. 471 (1921).

³⁸ *Mercur, J.*, in *Trutt v. Spotts*, 87 Pa. 339, 342 (1878); *Clarke v. McNulty*, 3 S. & R. 364 (Pa. 1817).

³⁹ *Stewart v. Webb*, 14 Pa. 331 (1850); *Williams v. O'Donnell*, *Herbert v. Northern Trust Co.*, both *supra* note 37.

⁴⁰ *Knepper v. Kurtz*, 58 Pa. 480, 484 (1868).

⁴¹ *Sharswood, J.*, in *Scott v. Scott*, 70 Pa. 244, 248 (1871).

⁴² *Paul v. Witman*, 3 W. & S. 407 (Pa. 1842).

⁴³ *Dobbins v. Brown*, 12 Pa. 75 (1849); *Wilson v. Cochran*, 46 Pa. 229 (1863); *Peck v. Jones*, 70 Pa. 83 (1871).

⁴⁴ *Knepper v. Kurtz*, *supra* note 40.

⁴⁵ 42 Mass. 450 (1840).

said Justice Dewey, "it is necessary that the warrantor should have been seised of the land, for, by a conveyance without such seisin, the grantee acquires no estate and has no power to transfer to a subsequent purchaser the covenants in his land, because no estate passes; there is no land to which the covenant can attach. If, therefore, the defendant at the time of making his deed was not seised, then the covenant of warranty did not pass to the plaintiffs as assignee, and the only liability of the defendant is upon his covenant of seisin, which covenant for the reason already stated, is wholly unavailable to the plaintiffs." And the same rule has been more recently applied in Wisconsin.⁴⁶ The covenants of a grantor of land, if he has no title and no possession, and the grantee does not take immediate possession, are declared to be personal to the grantee and are not transmitted to subsequent grantees by a mere conveyance of the land. In Ohio the same view is maintained. The clear distinction concerning the nature of the possession or seisin justifies a longer quotation.

"The covenant of seisin is *in presenti* or *in futuro*, and may be personal or real. If it never attach to the land, it is instantly broken and personal; if it once attach, it is real, and runs with the land. If the grantor be in actual possession, claiming adversely, the covenant of seisin runs with the land and is not broken until the purchaser or those claiming under him are evicted by paramount title. But if the grantor is not in actual possession and has not title, the covenant of seisin is instantly broken and is personal. If, under such circumstances, the grantee should see proper to convey, the purchaser from him could not sue upon the original covenant of seisin as, with the first grantor, he is neither in privity of estate or contract, and the covenant in such a case being personal is a chose in action not transferable, but remains to the first grantee." ⁴⁷

As some kind of possession or seisin is needful to carry the covenant down to an assignee and thus enable him to avail himself of it, the courts have encountered much difficulty in determining

⁴⁶ *Nesbit v. Nesbit*, 1 Taylor 403 (N. C. 1801); *Wallace v. Pereles*, 109 Wis. 316, 85 N. W. 371 (1901).

⁴⁷ *Devore v. Sunderland*, 17 Ohio 52 (1848).

what that possession must be. Thus in the second trial of the *Slater* case⁴⁸ it was held that even a tortious possession by the covenantor sufficed to attach the covenant to the land, and the Supreme Court of Illinois went further in questioning the need of possession in a case founded on a covenant of warranty against all patent titles. "If," said the Court,⁴⁹ "the question of possession is all important in reference to the passing of the covenant to an assignee, it is not the possession of the covenantor that is material, but that of the covenantee when he makes his conveyance. This is the first time that the covenant passes as attached to the estate. When first made it is made to the covenantee strictly and in person, and he takes the benefit by virtue of his contract and not as incident to his estate. It can certainly never be held that if he takes possession and is evicted by paramount title he cannot recover because the land was vacant when the deed was made to him. Even then if we concede that he must take possession before he can pass the covenant to his grantee, as attached to the land, we are wholly unable to see why it does not pass if he has taken possession, or whether the possession or non-possession of the covenantor, when the covenant was made, has to do with its passing to the grantee of the covenantee." And the Supreme Court of Virginia has gone still further in a contention that the contingent interest of one of several covenantors dependent upon another of them dying without issue, was a sufficient estate to carry the covenant to an assignee, and held that it was not needful that any estate should pass from the covenantor, and that even a stranger could make a covenant that would pass with the land.⁵⁰ Nor is this court alone in holding such an opinion.⁵¹

Let us now turn to our own courts. After diligent research I have found no case in which the question has arisen. And the reason, doubtless, is that at an early date equity came to the relief of the complainant who had need of founding his action

⁴⁸ 47 Mass. 439 (1843).

⁴⁹ *Wead v. Larkin*, 54 Ill. 489 (1870).

⁵⁰ *Dickinson v. Hoopes*, 8 Gratt. 353, 396 (Va. 1852).

⁵¹ See *Wead v. Larkin*, *supra* note 49.

on privity of estate. This was decided in 1796 in *Dunbar v. Gumper*; ⁵² perhaps the first case in American jurisprudence to hold that in equity parties and their assigns to covenants who had a proper knowledge of them were bound notwithstanding their lack of privity of estate. For this lack adequate knowledge was held to be an effective substitute.

Incidentally the question was touched in *Hawthorn's Appeal*.⁵³ A purchaser knew that the vendor had previously sold by articles of agreement land purchased by him to another. This sale, however, did not prevent the second purchaser from recovering on his covenant of warranty. Likewise in the *Midland Mining Company* case ⁵⁴ a purchaser bought and paid for several pieces of land, one or more of which had no actual existence. Should he proceed against his vendee, inquired Justice Williams, on his covenants, or should he rescind the contract *in toto*? He had his election. In *Clarke v. McAnulty*,⁵⁵ Justice Gibson remarked that as it is usual to sell land of which the vendor was not in possession, a larger operation should be given to the covenant of warranty, because the vendee, who did not obtain actual possession, would otherwise be without remedy.

Theoretically, of course, a covenant running with land must be attached to it, or to some interest or estate therein; if unattached to anything is worthless. Seemingly, however, in Pennsylvania no case has come before the courts in which the question has been raised for judicial determination. In many states the English statute against the sale of pretended titles has been enacted, but not in Pennsylvania. It was admitted in *Cresson v. Miller* ⁵⁶ that the English rule, that a conveyance by a party out of possession of land and which was held adversely by another was void, did not prevail in this State. But it was contended that great vigilance was required of the vendee, that it was his duty

⁵² 2 Yeates 74, 77 (Pa. 1796). For leading cases on notice see *Whitney v. Union Ry.*, 11 Gray 359 (Mass. 1858); *Parker v. Nightingale*, 6 Allen 341 (Mass. 1863); *De Gray v. Monmouth Beach Club*, 50 N. J. Eq. 359 (1892).

⁵³ 3 Atl. 20 (1886).

⁵⁴ *Midland Mining Co. v. Lehigh Valley Coal Co.*, *supra* note 19.

⁵⁵ 3 S. & R. 364, 372 (Pa. 1817).

⁵⁶ 2 W. 276 (Pa. 1834).

to make inquiries which under different circumstances he could not be compelled to make. The court declared that all vendees were bound to take notice of the records in the recorder's office, but were not bound to seek for secret encumbrances or equities. There was no intimation, however, that the general warranty in that case did not run with the land and prevent the right of the assignee to have recourse to other parties than his immediate grantor.

How far does the grantee's knowledge of a defect in the grantor's title affect his covenants of general warranty and for quiet enjoyment? Knowledge of an existing defect in the title at the time he accepted the deed does not of itself impair the covenant. Such a fact is a circumstance to be considered when it becomes a question whether it was understood and intended that the covenants were to extend to that particular defect, and the truth with respect to this may always be shown.⁵⁷ When the covenants in a deed are general with nothing expressly excepted, "the burden is on the grantor who seeks to escape from a liability fairly covered by the general terms of the covenants to show that his grantee accepted the title notwithstanding the defect."⁵⁸ The general covenant of warranty may be broken as soon as made; and the existence of a better title with an actual possession under it in another is of itself a breach of covenant.⁵⁹

Besides this covenant of general warranty and that of quiet enjoyment there is an implied statutory covenant founded on the early provincial *Act of 1715*, which has played an important part in the law of land covenants in Pennsylvania. It provides that "all deeds to be recorded in pursuance of this act, whereby any state of inheritance in fee simple shall hereafter be limited to the grantor and his heirs, the words 'grant,' 'bargain,' sell,' shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit, that the grantee was seised of an indefeasible estate in fee simple, freed from encumbrances done or suffered from

⁵⁷ *New York & Cleveland, etc., Co. v. Graham*, 226 Pa. 348, 75 Atl. 657 (1910).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

the grantor (excepting the rents and services due to the lord of the fee) as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed and that the grantee, his heirs, executors, administrators and assigns, may in any action, assign breaches, as if such covenants were expressly inserted."⁶⁰ This statute was interpreted in the case of *Bender v. Fromberger*,⁶¹ and the words "grant, bargain and sell" were held to import a general warranty. In the subsequent case of the *Lessee of Gratz v. Ewalt*,⁶² the statute was more critically interpreted and while it was held that the words "grant, bargain and sell" by themselves implied a general warranty, they must not be taken alone but in connection with the subsequent covenant against encumbrances, for, said Chief Justice Tilghman, "if it was intended that the covenant should be that the grantor was seised of an estate absolutely indefeasible, it was improper to add the subsequent words, 'freed from encumbrance alone or suffered by him.'" This construction, says Rawle, has never been departed from in Pennsylvania, and is in harmony with the British statute on which that of Pennsylvania was founded.⁶³

Still later, in *Shaffer v. Greer*,⁶⁴ Justice Sharswood has remarked that the words "grant, bargain and sell" in a conveyance of fee simple is a covenant, only against acts done or suffered from the grantor. "The word 'suffered' necessarily implies that it is not confined to the voluntary acts of the grantor and it has never been doubted that he is liable on a judgment obtained against him by adverse proceedings." A more recent construction of the words "grant, bargain and sell," used in the *Act of 1715* has been given by Justice Paxson in *Memmert v. McKeen*.⁶⁵ By virtue of

⁶⁰ Act of May 28, 1715, 1 Sm. L. 94. See RAWLE, COVENANTS FOR TITLE (5th ed. 1887) § 285.

⁶¹ 4 Dall. 436 (1806).

⁶² 2 Binn. 95 (Pa. 1809).

⁶³ RAWLE, *supra* note 60; *Dorsey v. Jackman*, 1 S. & R. 50 (Pa. 1814); *Seitzinger v. Weaver*, 1 R. 382 (Pa. 1829); *Whitehill v. Gotwalt*, 3 P. & W. 313 (Pa. 1830); *Funk v. Voneida*, 11 S. & R. 109, 111 (Pa. 1834); *Knepper v. Kurtz*, *supra* note 40.

⁶⁴ 87 Pa. 370 (1878); *Gilham v. Real Estate, etc., Co.*, 11 Pa. D. R. 50 (1901).

⁶⁵ 112 Pa. 315, 320, 4 Atl. 542 (1886).

this *Act* the words mentioned "are a covenant of seisin, a covenant for quiet enjoyment and a covenant against encumbrances. These, the justice declared, were of two kinds, (1) such as affect the title, and (2) those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former, a public road or right of way of the latter. Where encumbrances of the former class exist, the covenant is broken the instant it is made, and it is of no importance that the grantee had no notice of them when he took the title.⁶⁶ Such encumbrances are usually of a temporary character and capable of removal; the very object of the covenant is to protect the vendee against them, hence knowledge, active or constructive, of their existence, is no answer to an action for breach of such covenant. Where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not title, but the physical condition of the property, a different rule prevails. Thus it was held in *Patterson v. Archers*⁶⁷ that where the owner had covenanted to convey certain lots free from all encumbrances, a public road which occupied a portion of such lots was not an encumbrance within the meaning of the covenant. This not because of any right acquired by the public, but by reason of the fact that the road, although admittedly an encumbrance, and possibly an injury to the property, was there when the purchaser bought, and he is presumed to have had knowledge of it. In such and similar cases there is the further presumption that if the encumbrance is really an injury, such injury was in the contemplation of the parties, and that the price was regulated accordingly. An encumbrance of the second class, therefore, an easement for example, which affects not the title but the physical condition of the property, and is presumed to have been known by the grantee, is not within the meaning of a covenant of a general warranty in a deed, nor of the covenant established by the *Act of 1715*."

In applying the statute thus interpreted it includes a tax assessed on the land during the grantor's title.⁶⁸ But an entry on

⁶⁶ Funk v. Voneida, *supra* note 63; Cathcart v. Bowman, *supra* note 23.

⁶⁷ 9 W. 152 (Pa. 1839).

⁶⁸ Shaffer v. Greer, 87 Pa. 370 (1878).

land by authority of the state in the exercise of its rights of eminent domain is not a breach of the covenant, as the fee of the land still remains in the owner, and the entry is without his consent.⁶⁹ Again, if taxes are assessed after a vendor sells land by articles of agreement and remain unpaid by the vendee, the encumbrance thus created is not an encumbrance "done or suffered from the grantor" within the meaning of the *Act of 1715*, defining the words, grant, bargain and sell.⁷⁰

Other applications of the statute have been made to mortgages. Thus the covenant against encumbrances implied in the words, "grant, bargain and sell" will not be enforced to compel the payment of a mortgage on land sold but not mentioned in the deed when, by virtue of an agreement between the parties, other land is subsequently conveyed to the grantee in payment of the mortgage.⁷¹

On another occasion *A* by deed "granted, bargained and sold," land with a special warranty. Previously by a recorded deed he had conveyed to a stranger the timber on the land with the privilege of cutting it during a "specified period." This covenant was broken as soon as executed, and notice of the encumbrance was immaterial before seeking for a remedy.⁷² More recently a deed conveying real estate underlaid with coal contained the words, "grant, bargain and sell," and a covenant of general warranty. Failure to deliver the coal was held to be a breach of the covenant under the *Act of 1715*, for which *assumpsit* was the proper remedy⁷³ since the abolition of the distinction between actions of covenant and *assumpsit*.⁷⁴

This statute has been literally enacted in several states; in others with slight alterations. In Alabama the Supreme Court has declared that the statute should receive a strict construction, words should not be extended beyond their ordinary meaning, nor

⁶⁹ *Dobbins v. Brown*, *supra* note 43; *Ake v. Mason*, 101 Pa. 17, 20 (1882).

⁷⁰ *Gheen v. Harris*, 170 Pa. 644, 32 Atl. 1094 (1895).

⁷¹ *Johnston v. Markle Paper Co.*, 153 Pa. 189, 25 Atl. 560 (1891).

⁷² *Cathcart v. Bowman*, *supra* note 23.

⁷³ *Clark v. Steele*, 255 Pa. 330, 99 Atl. 1001 (1917).

⁷⁴ *Act of May 25, 1887*, P. L. 271 § 1, PA. STAT. (1920) § 17177.

should the contemplated covenants be implied by less than all the effective words in the statute,⁷⁵ and the same interpretation is given to the words by the Supreme Court of Arkansas.⁷⁶ The Supreme Court of Mississippi has remarked that the words "grant, bargain and sell" in a deed of conveyance of themselves import covenants of general warranty of title and against encumbrances and for quiet enjoyment as effectively as though such covenants had been expressly contained in the deed.⁷⁷

The third kind of covenant of warranty is a special one but different from the covenant above mentioned. Thus in *West v. Stewart*⁷⁸ the deed described a lot together with the buildings and improvements, and the warranty was for "all and singular the lot of ground with the appurtenances," etc. This covenant was declared to be "special and extended much further than the terms of a general warranty." The removal, therefore, of a building by the tenant under a prior agreement with the grantor was clearly a breach of the covenant of warranty. It may also be remarked that the statutory warranty of 1715 is sometimes called an implied warranty, more often a special warranty.⁷⁹

As privity of contract is personal and confined to the contracting parties, to create a valid covenant that will pass an estate or interest in land and run therewith, there must also be a privity of estate between the covenanting parties. Thus if *A* leases land to *B*, receiving rent, and *B* assigns his lease to *C*, *A* may maintain an action of debt for the rent against *C*, because there is a privity of estate between them.⁸⁰ Many a case has foundered since the decision in *Spencer's Case* from lack of privity of estate, but rarely in Pennsylvania. Most of the appli-

⁷⁵ *Roebuck v. Dupuy*, 2 Ala. 535 (1841); *Gee v. Pharr*, 5 Ala. 586 (1843); *Parker v. Parker*, 93 Ala. 426 (1890); *Heflin v. Phillips*, 96 Ala. 568 (1892).

⁷⁶ *Winston v. Vaughan*, 22 Ark. 72, 76 (1860); *Brodie v. Watkins*, 31 Ark. 319 (1876).

⁷⁷ *Latham v. Morgan*, 1 Sm. & Marsh. 611 (Miss. Ch. 1812); *Bush v. Cooper*, 26 Miss. 599 (1853).

⁷⁸ 7 Pa. 122 (1847).

⁷⁹ *Withers v. Baird*, 7 W. 227 (Pa. 1838); *Espy v. Anderson*, 14 Pa. 308, 312 (1850); *Cadwalader v. Tryon*, 37 Pa. 318, 322 (1860); *Lloyd v. Farrell*, 48 Pa. 73, 78 (1864).

⁸⁰ *Beach v. Morris*, 12 S. & R. 16 (Pa. 1824).

cations of this principle have been in the construction and enforcement of leases. A lessee during his occupation holds both by privity of estate and of contract. This privity of estate depends upon and exists with the continuance of his term. By an assignment of the term, his privity of estate is transferred to his assignee. It, however, remains annexed to the estate, so that the assignee holds in privity of estate with the original landlord.⁸¹

In applying this principle to a term of years, sold by a sheriff under execution, the sale operates and takes effect as an assignment in law. A purchaser at such sale takes the estate liable to such covenants of the lessee as may have attached to the property demised. As he assumes these liabilities of the lessee, he takes all the interest of the assignee in the thing assigned, whether in possession or in expectancy. He is obliged to perform all the covenants of his lessor which are annexed to the estate so long as he retains possession. By accepting possession of the property, although the assignee may not be named in the original lease, yet he subjects himself to all the covenants that run with the land. And if there be a covenant to insure the land which is not merely personal or collateral, it becomes annexed to the premises and all its obligations as well as privileges pass to the purchaser of the term of years.⁸²

In the case of the *Washington Natural Gas Company*⁸³ it was held that, owing to his privity of contract with the lessor, a lessee's liability on his covenant in an oil and gas lease continued after his assignment of the lease. As an assignee of the lease, however, was in privity of estate only with the lessor, he was liable only on his covenant, which was broken while his privity of estate existed. Each successive assignee was liable on his covenant broken while the title was held by him;⁸⁴ but as no contract relation existed with the lessor he was not liable on a covenant broken before he acquired the title or that matured after he had

⁸¹ *Simons v. Van Ingen*, 86 Pa. 330 (1878).

⁸² *Ibid.*

⁸³ *Washington Nat. Gas Co. v. Johnson*, 123 Pa. 156, 16 Atl. 799 (1888).

⁸⁴ *Ibid.*

parted with it.⁸⁵ In deciding this case Justice Williams remarked that an assignee in acquiring the leasehold estate by an assignment of the lease is fixed with notice of its covenant, and he takes the estate of his assigns *cum onere*. But as his liability grows out of privity of estate, it ceases when the privity ceases. If he had assigned before the time for performance, his liability would have ceased with his title, and liability would have attached to his assignee by reason of privity of estate, and so on, *toties quoties*. Each successive assignee would be liable for covenants maturing while the title was held by him because of privity of estate, but he would not be liable for those previously broken, or subsequently maturing, because of the absence of any contract relations with the lessor. While he holds the estate and enjoys its benefits, he bears its burdens, but he lays down both the estate and its burdens by an assignment, even though his assignment be to a beggar.⁸⁶

A covenant for the performance of some duty in connection with the possession of land and relating thereto, or in the nature of rent, or royalty for the use and enjoyment of the premises, is a covenant running with the land. The rent need not be money; it may be a share in the crops of a farm or in an oil lease.⁸⁷ Moreover an owner of land who executes an oil and gas lease and, after a default in paying the rental, executes a second lease to other parties in which it is expressly provided that they shall stand between him "and all who may have claim to this lease," does not thereby declare a forfeiture of the first lease.⁸⁸

Again, a lease from *A* to *B* to explore on his farm for oil and "to continue with due diligence and without delay, to prosecute the business to success or abandonment, and if successful to prosecute the same without interruption and for the common

⁸⁵ *Fennell v. Guffey*, 139 Pa. 341, 20 Atl. 1048 (1890); *Springer v. Citizen's Nat. Gas Co.*, 145 Pa. 430, 22 Atl. 986 (1891). See *Cleminger v. Baden Gas Co.*, 159 Pa. 16, 28 Atl. 293 (1893); *Liggett v. Shira*, 159 Pa. 350, 28 Atl. 218 (1893).

⁸⁶ *Thomas v. Connell*, 5 Pa. 13 (1846); *Wickersham v. Trever*, 14 Pa. 108, 111 (1850); *Hannen v. Ewalt*, 18 Pa. 9, 11 (1851); *Negley v. Morgan*, 46 Pa. 281 (1863); *Borland's Appeal*, 66 Pa. 470 (1870).

⁸⁷ *Fennell v. Guffey*, *supra* note 85; *Landell v. Hamilton*, 175 Pa. 327, 34 Atl. 663 (1896); *Stone v. Marshall Oil Co.*, 188 Pa. 602, 41 Atl. 748 (1898).

⁸⁸ *Stone v. Marshall Oil Co.*, *supra* note 87.

benefit of the parties," runs with the land. *B* assigned an interest in such a lease to *C* and *D*, and they with *B* assigned an interest to *E* who was thereby bound. In a controversy that arose between them, *B* contended that his covenant was personal, but failed in his contention.⁸⁹ In another case a land improvement company reserved all the coal beneath the surface and provided that no mine or air shaft should be intentionally opened on the surface of the land. The owners of some of the lots sought to open a mine and get coal. They were, however, enjoined as the covenant was intended for the protection of all the lots.⁹⁰

Whether there was a privity of estate and the running of a covenant has been questioned in agreements relating to the building of dams across streams of water and the use thereof for mill purposes. In one of these,⁹¹ *C* and *M*, adjoining owners on a stream, made an agreement which provided that *C*, his heirs and assigns, should enjoy a water right or power for two wheels, and *M*, his heirs and assigns, should enjoy the surplus. The covenants contained in this agreement, said Justice Clark, were by the covenantors for the mutual benefit of themselves, their heirs, executors, administrators or grantees, and the present owners holding the land by conveyance from the covenantors respectively, under the law of this state, were in privity of estate with them respectively. The court was of the opinion, therefore, that the covenants in question ran with the land, and defined the rights, not only of the parties thereto, but of their respective heirs and assigns.

"To the general rule," continued the justice, in a luminous opinion that has been often cited in other jurisdictions, "that between the covenantor and covenantee there must be such a privity of estate as would formerly have given rise to the rule of tenure, there are in this state well-recognized exceptions. Covenants capable of running with an assignment of a present estate of land may, it seems, have that capacity in certain cases, although no estate passes between the covenantor and covenantee at the

⁸⁹ *Bradford Oil Co. v. Blair*, 113 Pa. 83, 4 Atl. 218 (1886).

⁹⁰ *Electric Co. v. Coal Co.*, *supra* note 5.

⁹¹ *Horn v. Miller*, 136 Pa. 640, 654, 20 Atl. 706 (1890).

time of covenant made. The obligations of contract are, in general, limited to the parties making them; where privity of contract is dispensed with, there must ordinarily be privity of estate; but justice sometimes even requires that the right to enjoy such contract should extend to all who have a beneficial interest in their fulfilment, not to impose a burden upon an ignorant and innocent third person, but to enable purchasers of land to avail themselves of the benefits to which they are in justice entitled. The character of a covenant of this kind must depend upon the effect of the entire agreement of which it is a part, and, where the benefit and the burden are so inseparably connected that each is necessary to the existence of the other, both must go together; the liability to the burden will be a necessary incident to the right to take benefit."

In *Lindeman v. Lindsey*,⁹² the owners on opposite sides of a creek agreed to erect a dam; each was to have the use of half of the water, with a covenant for themselves, their heirs, and assigns, to repair and rebuild. This covenant ran with the land, the dam having been constructed for the mutual benefit and advantage of the parties with direct relation to the enjoyment and use of the land. "When, therefore," said Justice Sharswood, "they enter into an agreement to erect such a dam, with a covenant for themselves, their heirs and assigns, to repair or rebuild it if necessary, it is not a personal covenant merely, but runs with the lands of the respective owners, and the stipulations contained in such an agreement in respect to the enjoyment of the water power created by the dam, form the basis of their respective rights."

Likewise in *Carr v. Lowry*⁹³ there was a grant of an easement, the right to cut and keep up a tail-race through C's land for the benefit of L's adjoining lands, to which was annexed a covenant of L, his heirs and assigns, to keep the race timbered, planked and covered with earth. The burden imposed was necessarily incident to the enjoyment of the benefit, and the contract, so the court held, defined the duties which ought to be performed

⁹² 69 Pa. 93 (1871); see *Jamison v. McCreedy*, 5 W. & S. 129 (Pa. 1843).

⁹³ 27 Pa. 257 (1856).

by whoever should be the owner of the mill for the benefit of which the easement was created. Did this covenant run with the land? "We cannot presume," said Justice Lowrie, "that *L* intended to bind his personal representatives to such duties. In the natural order of affairs, they accompany the ownership of the property to which they relate, and therefore in the present case ought to be performed by the heirs or assigns of *L*, if they claim under the title then acquired by him. The relation between *C* and *L*, on which the duty depends, was dissolved by *L*'s death, if not before, and his administratrix can be charged to answer only for a breach in his lifetime."

In another case the owners of land on opposite sides of the river agreed to build and repair a dam for the use of their respective properties. The mill and interest of one of them was sold by execution on a judgment entered before the making of the agreement. "The assent of the sheriff's vendee who used the dam as theretofore and of the remaining co-tenant, was held sufficient to continue the covenants in the agreement, though in strictness not running with the land, because of the priority of the judgment. If the covenants had been anterior to the lien of the judgment, then they would in form and in fact have been clearly covenants running with the land."⁹⁴ A verbal license to divert the water of a stream running through the grantor's land, though given without consideration, has been held to be equivalent to a formal conveyance of the right, after the building of a mill in reliance thereon. The expenditure of money or labor required in the enterprise to divert the water-course in a particular way had the effect of turning the license into an agreement enforceable in equity.⁹⁵ Such a license thus executed is binding on all subsequent purchasers.⁹⁶

On the other hand, the cases are infrequent in which the attempts to establish land-running covenants have failed. One of

⁹⁴ *Campbell v. Hand*, 49 Pa. 234 (1865).

⁹⁵ *Rerick v. Kern*, 14 S. & R. 267 (Pa. 1826).

⁹⁶ *McKellip v. McIlhenny*, 4 W. 317 (Pa. 1835); *Campbell v. McCoy*, 31 Pa. 263 (1858).

them contained an assignment of an oil and gas lease in consideration of a certain sum paid at the time of the assignment and the further consideration of \$1000 if oil was found in a well drilled in the land described in the lease, which was operated by the assignee. This created no covenant running with the land, and the assignor was not therefore entitled to recover from an assignee the \$1000 mentioned in the assignment.⁹⁷ Again a covenant in a deed of conveyance to take the estate granted subject to the contracts and agreements to which the grantor was liable as a partner of a firm conveyed the estate clear of everything but a personal covenant of the grantee, and created no charge on the land.⁹⁸ Nor does a covenant run between the vendor of land and an assignee of the purchaser who is to complete payments for the purchase. Thus a person by articles of agreement conveyed land to another which was to be paid in installments. On payment of the last installment he was to receive a deed. He assigned the articles and the land to another who failed to make the required payments. The vendor then sued the assignee for the purchase money, but failed in his suit as there was neither privity of contract nor of estate between them.⁹⁹ Moreover, when land subject to a covenant that runs with it has been conveyed in parcels to several owners, each parcel is entitled to the benefit *pro rata* of the covenant.¹⁰⁰

In equity the test to determine whether a covenant in a deed runs with the land is the intention of the parties. To ascertain this, the courts may interpret the words of the covenant in the light of the surroundings of the parties and the subject of the grant, and since in Pennsylvania the courts have always looked at questions from the eye of equity as well as the legal eye, the lack of privity of estate has not proved a stumbling block, as it has so often elsewhere, to the running of a covenant with the land where

⁹⁷ Fisher v. Guffey, 193 Pa. 393, 44 Atl. 452 (1899).

⁹⁸ Hepburn v. Snyder, 3 Pa. 72 (1846).

⁹⁹ Beach v. Morris, 12 S. & R. 16 (Pa. 1824).

¹⁰⁰ McClure v. Gamble, 27 Pa. 288 (1856); St. Andrew's Lutheran Church's Appeal, 67 Pa. 512 (1871); Muzzarelli v. Hulshizer, 163 Pa. 643, 30 Atl. 291 (1894).

the parties thereto had knowledge of it.¹⁰¹ Adequate knowledge has served in equity as an effective antidote for privity of estate. In *Dunbar v. Jumper*¹⁰² the covenant provided for the grinding of the lessor's corn sent to the lessee's mill. The court held that the covenant related to the mill, ran with the land, and was binding on the assignee. Equity decreed that the assignee should pay rent after he and his assigns had enjoyed the estate. "And, though the assignees may not be liable at law for an incorporeal inheritance for want of privity of estate, yet equity would oblige them to answer for the rent. If assignees of a lease assign it over, equity will compel them to pay the rent which became due during their enjoyment, though the privity of estate was destroyed in law." Indeed, whether the complainant goes into a court of law or equity, he employs an equitable remedy. Says Judge Thayer:

"The doctrine relating to covenants running with the land has been carried in Pennsylvania as far as in any other state, perhaps further than in some, a fact which may be due to the fact that if an assignee who has no other remedy can, as it would seem he may, file a bill in equity; there is no reason why he should not bring covenant in Pennsylvania, where the courts administer equitable principles through legal forms."¹⁰³

In establishing this equitable principle of notice, as a substitute for privity of estate in land running covenants, an important step was taken in the way of administering justice long in advance of the courts in other states. In recent years the most frequent application of the rule has been in covenants restricting the mode of building on land. These cases need not be reviewed, but a few applications of the rule to them may be given. Thus

¹⁰¹ *Clark v. Martin*, 49 Pa. 289, 297 (1865); *St. Andrew's Lutheran Church's Appeal*, *supra* note 100; *Muzzarelli v. Hulshizer*, *supra* note 100; *Bald Eagle Valley R. R. v. Nittany Valley R. R.*, 171 Pa. 287, 33 Atl. 239 (1895); *Landell v. Hamilton*, 175 Pa. 327, 34 Atl. 663 (1896); *Electric Co. v. Coal Co.*, *supra* note 5; *McCloskey v. Kirk*, 243 Pa. 319, 90 Atl. 73 (1914); *De Sanno v. Earle*, 273 Pa. 265, 270, 117 Atl. 200 (1922).

¹⁰² *Supra* note 52.

¹⁰³ *Provident Life & Trust Co. v. Fiss*, 147 Pa. 232, 236, 23 Atl. 560 (1892).

it has been held that "the manner in which restrictions limiting the use of land are created may be by reservation in the deed, by a condition annexed to a grant, by a covenant, or even by parol agreement of the grantees. When created by covenant, it runs with the land. Whether it runs with the land or is an easement is immaterial, provided the creation of the restriction is clearly defined and is understood by the parties at the time. If reasonable, the restrictions may be enforced in courts of equity against the land designated to be benefited or burdened in whosoever hands the lands may be. . . ." ¹⁰⁴

While building restrictions are lawful and enforceable, they are not favored, says Justice Frazer:

"In construing covenants restricting the use of land, we must bear in mind the general rule that such stipulations will be construed most strictly against the grantor and in favor of the free and unrestricted use of the property, and nothing will be regarded as a violation if that is not in plain disregard of its express word. Such restrictions are not favored by the law, and the courts will not recognize implied rights or extend covenants by implication." ¹⁰⁵

If the grantors and grantees of contiguous lots covenant with each other that each lot shall be subject to similar specified restrictions, this is a land-running covenant and binds the successive owners. Likewise, if the owner of a city lot executes and delivers to the owner of an adjoining lot an agreement giving to him the right to insert beams in a wall which he is about to build, and this is expressly made a covenant running with the land, the covenantor cannot several years afterward deny the effectiveness of the covenant as against the owner of the second lot who has taken title without notice of the agreement, because there was a failure of consideration. ¹⁰⁶

¹⁰⁴ Opinion of Miller, P. J., in *McCloskey v. Kirk*, *supra* note 101.

¹⁰⁵ *Crofton v. St. Clement's Church*, 208 Pa. 209, 213, 57 Atl. 570 (1904); *Johnson v. Jones*, 244 Pa. 386, 389, 90 Atl. 649 (1914); *Binswanger v. Hyman*, 271 Pa. 296, 299, 114 Atl. 628 (1921); *De Sanno v. Earle*, *supra* note 101.

¹⁰⁶ *St. Andrew's Lutheran Church's Appeal*, *supra* note 100; *Knappenberger v. Fairchild*, 210 Pa. 173, 59 Atl. 986 (1904).

In many cases the reasons for the restriction have greatly changed or ceased to exist. Nevertheless, if the restriction still retains some value to the owner of the dominant estate, equity will restrain a violation of the covenant, provided relief is sought within a reasonable time.¹⁰⁷ If, therefore, a residential neighborhood which is in transition still retains to a considerable extent its character, the covenant may be enforced.¹⁰⁸ A still further problem arises whether covenants run with the land for the benefit of a stranger. This question has been the subject of elaborate discussion in some of the states, but has not been raised in Pennsylvania.¹⁰⁹

A covenant by a railway company in a deed for a portion of its right of way "to fence and keep said road fenced" is a covenant running with the land and is binding on a successor. "Though there be no privity of the contract between the original grantor or his personal representatives, and those in possession of the land, there is a privity of estate, out of which an implied contract arises to perform, during the period of enjoyment, the conditions upon which the land was conveyed."¹¹⁰ But when adjoining land owners make an agreement concerning the maintenance of a particular fence, after the death of one of them, his administrator is not bound by the contract for any future repairs.¹¹¹ An interesting case has occurred of an owner of land who granted to a street railway passage through his land in consideration of receiving a free electric current and free passes for members of his family while they resided at their present residence. The company afterward sought to defeat the grant because of the family's temporary absence, though it had furnished

¹⁰⁷ *Landell v. Hamilton*, *supra* note 101.

¹⁰⁸ *Phillips v. Donaldson*, 269 Pa. 244, 246, 112 Atl. 236 (1920); *Hunter v. Wood*, 277 Pa. 150 (1923).

¹⁰⁹ Especially in *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611 (1891), 142 N. Y. 78, 36 N. E. 870 (1894), 147 N. Y. 456, 42 N. E. 17 (1895), 152 N. Y. 457, 46 N. E. 949 (1897). The judges divided four to three in each of the four appeals.

¹¹⁰ *Kelly v. Nypano R. R.*, 200 Pa. 229, 49 Atl. 779 (1901).

¹¹¹ *Bland v. Umstead*, 23 Pa. 316 (1854). See *Dickinson v. Calahan*, 19 Pa. 227, 233 (1852).

the current and passes after their return. Needless to add the company failed.¹¹²

A covenant in a ground rent deed does not survive against executors and administrators except as to the rents which accrued in the lifetime of the decedent.¹¹³ And a covenant made by him whereby he bound himself to be responsible for and guarantee the payment of the interest on a mortgage until the mortgaged premises should be so improved as to constitute adequate security for the mortgaged debt, survives the death of the covenantor and can be enforced against his personal representatives, so as to recover interest accruing thereafter.¹¹⁴ Said Justice Paxson:

"The general rule is that all personal covenants survive to the executor or administrator of the covenantor, and to take a case out of the rule there must be something more than the mere fact that the covenant is to be performed *in futuro*. We are clearly of opinion that the executors of the testator are bound by his covenant to pay the interest on the mortgages in question."¹¹⁵

A mortgage is so far a conveyance of land that a covenant real annexed thereto passes to the grantee and his assigns. And when the land is sold on foreclosure to whom do all the benefits of the covenant go? To the mortgagee, or to the purchaser of the equity of redemption? The question, though important, does not seem to have arisen in this state. It was long ago answered by Chief Justice Shaw by saying, "to both according to their respective rights in the estate."¹¹⁶ If two persons execute a mortgage on their land and subsequently a third person acquires an undivided interest therein, and the three execute a deed of general warranty the third person is liable for a breach

¹¹² *Humbert v. West Penn R. R.*, 228 Pa. 440, 77 Atl. 661 (1910).

¹¹³ *Hunt's Appeals*, 105 Pa. 128 (1884).

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* 139; *Quain's Appeal*, 22 Pa. 510 (1859); *Williams' Appeal*, 47 Pa. 282 (1864); *Gardiner v. Painter*, 3 Phila. 365 (1859). An action for ground rent under the Act of April, 1850, will lie against the assignee of the lessee for arrears which accrued before the assignment. *McQuesney v. Hiester*, 33 Pa. 435 (1859).

¹¹⁶ *White v. Whitney*, 44 Mass. 81, 87 (1841). See *Le Ray de Chaumont v. Forsythe*, *supra* note 13; *Pryor v. Wood*, 31 Pa. 142 (1858).

of it resulting from an eviction under the present title created by the mortgage.¹¹⁷

In agreements relating to party walls, formerly a statute provided that payment by the non-builder should be made to the builder even though he had parted with his land since building the wall.¹¹⁸ In 1849 the statute was changed, and the covenant runs with the land; if, therefore, the builder parts with his title, the assignee is entitled to payment.¹¹⁹

In this state, in the sale of real estate, if the vendor's covenant is broken before the vendor has completed payment, he may detain the purchase-money as a defense. Failure of consideration is the ground of relief.¹²⁰ This, said Justice Woodward, "is a mode of defense peculiar to Pennsylvania."¹²¹ Previously the justice had remarked that Pennsylvania had gone farther in relieving purchasers of real estate from payment of purchase-money, on the ground of defects and encumbrances, than courts of justice have gone in any other state.

"We administer not only all equitable relief whilst the contract remains executory, but, after it has been executed by a deed made and delivered, we give the purchaser, besides the full benefit of any covenant his deed may contain, the right to defend himself from payment of the purchase money, however solemn the instrument by which it is secured, if he can show a clear outstanding defect or an encumbrance, unless he expressly assumes the risk of it."¹²²

He may therefore detain enough of the purchase money to cover the damages to which he would be entitled on the covenant.¹²³ And he may show that the title was defective either

¹¹⁷ Williams v. O'Donnell, 225 Pa. 321, 74 Atl. 205 (1909).

¹¹⁸ Davids v. Harris, 9 Pa. 501 (1848); Todd v. Stokes, 10 Pa. 155 (1848); Gilbert v. Drew, 10 Pa. 219 (1849); Danncker v. Riley, 14 Pa. 372 (1850); Bell v. Bronson, 17 Pa. 363 (1851).

¹¹⁹ Knight v. Benken, 30 Pa. 372 (1858); Voight v. Wallace, 179 Pa. 520, 524, 36 Atl. 315 (1897).

¹²⁰ Cathcart v. Bowman, *supra* note 23; Beauplaud v. McKean, *supra* note 1; Knepper v. Kurtz, *supra* note 40.

¹²¹ Wilson v. Cochran, 46 Pa. 229, 230 (1868).

¹²² Beauplaud v. McKean, *supra* note 1.

¹²³ Steinhauer v. Witman, 1 S. & R. 438 (Pa. 1815); Hart v. Porter, 5 S. & R. 201 (Pa. 1819); Christy v. Reynolds, 16 S. & R. 258 (Pa. 1827); Wilson v. Cochran, *supra* note 121.

in whole or in part, also whether or not there was a covenant of general warranty or of a right to convey, or of quiet enjoyment, or an encumbrance.¹²⁴

A purchaser, therefore, who has received his deed and given a mortgage for the purchase money, may deduct these from encumbrances known to him at the time of making the contract.¹²⁵ Likewise, where a vendor covenants to convey a title "clear of encumbrances" and afterward makes to the vendee a deed with special warranty, in an action on the mortgage given for the purchase money the vendee may prove that there is an outstanding right in a third party to enter, mine and carry away coal from the land conveyed.¹²⁶ A vendee, however, cannot maintain an action of covenant on a general warranty in his deed against his vendor for the action of the Commonwealth in appropriating a part of the land conveyed to the vendee to a public use.¹²⁷

On one occasion a vendor by direction of the vendee conveyed to the vendee's wife the land sold. A part of the consideration was other land of the vendee which the vendee and his wife conveyed to the vendor with a general warranty. The title to the latter land failed and the vendor sued the vendee and his wife in foreign attachment in covenant and attached the land conveyed to the wife. He failed to recover a judgment against her, for the covenant of warranty was held to be merely personal. Said Justice Sharswood: "The transaction between these parties was a mutual bargain and sale. The plaintiff took only the personal covenant of warranty of the defendants, who were husband and wife. This is an action on that warranty, and nothing is clearer

¹²⁴ *Steinhauer v. Witman*, *supra* note 123; *Roland v. Miller*, 3 W. & S. 390, 395 (Pa. 1842); *Murphy v. Richardson*, 28 Pa. 288, 292 (1857); *Lloyd v. Farrell*, 48 Pa. 73 (1864); *Weakland v. Hoffman*, 50 Pa. 513 (1865); *Herrod v. Blackburn*, 56 Pa. 103, 105 (1867); *Youngman v. Linn*, 62 Pa. 413, 416 (1868); *Cross v. Noble*, 67 Pa. 74, 78 (1870).

¹²⁵ *Tod v. Gallagher*, 16 S. & R. 263 (Pa. 1827); *Wolbert v. Lucas*, 10 Pa. 13 (1848).

¹²⁶ *Murphy v. Richardson*, *supra* note 124.

¹²⁷ *Patterson v. Arthur*, 9 W. 152 (Pa. 1839); *Dobbins v. Brown*, *supra* note 43; *Marclay v. Miltenberger*, 31 Pa. 37 (1856).

than that it cannot be maintained against the wife." ¹²⁸ And if a purchaser has paid part of the purchase money, he may recover it on discovery that the land was subject to an encumbrance, a private way, for example, of which he had no knowledge at the time of his purchase. ¹²⁹

There is an important limitation to the vendee's right to withhold the purchase money. He cannot withhold payment when he bought with his eyes open, having a clear knowledge of the defects. The law presumes not only that he knew but paid a smaller price. This limitation has been clearly set forth by Justice Woodward. ¹³⁰ Where there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain. But where there is a covenant against a known defect, he shall not detain purchase-money unless the covenant has been broken. If the covenant be for seisin, or against encumbrances, it is broken as soon as made if a defect of title or encumbrance exists, but if it be a covenant of warranty it binds the grantor to defend the possession against every claimant of it by right and is consequently a covenant against rightful eviction. ¹³¹ A vendee therefore with knowledge of the existence of encumbrances who accepts a deed with a warranty against them and gives his bond for the purchase money has no defense against the continued existence of such encumbrances. ¹³²

Nor is there any distinction between articles of agreement relating to the sale of land, which is an executory agreement, and a deed without general warranty where the purchase money has not all been paid. Says Justice Thompson: "A very different rule exists where the defects are unknown. There, wherever the

¹²⁸ *Dean v. Shelly*, 57 Pa. 426, 427 (1868).

¹²⁹ *McDermott v. Reiter*, 279 Atl. 545, 124 Atl. 187 (1924).

¹³⁰ *Wilson v. Cochran*, *supra* note 121.

¹³¹ *Fuhrman v. Loudon*, 13 S. & R. 386 (Pa. 1825); *Cadwalader v. Tryon*, 37 Pa. 318, 322 (1860); *Wilson's Appeal*, 109 Pa. 606, 609 (1885); *Lazarus v. Lehigh Coal Co.*, 246 Pa. 178, 92 Atl. 121 (1914).

¹³² *Fuhrman v. Loudon*, 13 S. & R. 386 (Pa. 1825); *Allen v. Martin*, 2 P. & W. 310 (Pa. 1831); *Lighty v. Short*, 3 P. & W. 447 (Pa. 1832); *Roland v. Tierman*, 8 W. & S. 193 (Pa. 1844); *Bradford v. Polts*, 9 Pa. 37 (1848); *Luken v. Jones*, 4 Phila. 18 (1860).

purchase-money remains unpaid, if there is no covenant of warranty the money may be retained.”¹³³

The vendee is not obliged to restore possession to the vendor before availing himself of the detention of the purchase-money as a defense.¹³⁴ But he cannot keep both the land and the purchase-money.¹³⁵ On the other hand, it is the vendor's business, if he finds that he cannot make such a title as the vendee is bound to accept, to refund what has been paid and bring an action of ejectment to recover the property.¹³⁶

While these are the leading rules that apply to the most general class of vendors, they do not apply to fiduciary vendors, who have no interest in the subject of the sale, or only a mere naked title. From these the purchaser is entitled to no covenants save that the grantor has done no act to encumber the estate, in other words, “the usual trustee covenant.” “Indeed,” says Rawle, “few persons could be found to act in a fiduciary or representative capacity if they were compellable to enter into covenants of greater scope.”¹³⁷ Nor can any express covenants be demanded from ministerial officers, sheriffs, marshals, tax collectors and the like, or be implied from any words of grant or leasing.¹³⁸

“To maintain an action for breach of the covenant,” says Justice Woodward, “an eviction must be laid and proved, not necessarily by judicial process or the application of physical force, but by the legal force of an irresistible title. There must be proof, at the least, of an involuntary loss of the possession, and as the right to detain purchase-money is of the nature of an action in the covenant, and is allowed to prevent circuitry, the vendee who seeks to detain by virtue of a covenant of warranty, is as much bound to prove an eviction as if he were the plaintiff in an action of covenant. Until eviction the covenant is part of the considera-

¹³³ *Cadwalader v. Tryon*, *supra* note 131.

¹³⁴ *Hart v. Porter*, *Steinhauer v. Witman*, *Christy v. Reynolds*, *Wilson v. Cochran*, all *supra* note 123; *Gans v. Renshaw*, 2 Pa. 34 (1845).

¹³⁵ *Smith v. Webster*, 2 Pa. 34 (1845).

¹³⁶ *Gans v. Renshaw*, *supra* note 134.

¹³⁷ *RAWLE*, *supra* at 43. See *Shontz v. Brown*, 27 Pa. 134 (1856).

¹³⁸ *RAWLE*, *supra* at 51; *Friedly v. Scheetz*, 9 S. & R. 156, 162 (Pa. 1823).

tion of the purchase money he agreed to pay, and holding the covenant he may not withhold the purchase money. But after eviction he has a right to have his damages deducted from the purchase-money." ¹³⁹

At what time, or on the happening of what event, does a breach occur? The covenants of warranty and for quiet enjoyment run until the covenantee is evicted, but the covenants for seisin, right to convey and against encumbrances are broken, if at all, at the moment of their creation. These covenants are then turned into mere rights of action; which are not assignable at law, and can be pursued only by the covenantee or his personal representatives; nor can they pass to an heir, devisee or subsequent purchaser.¹⁴⁰ In many states, however, the assignee by statute has a right of action for a breach of those covenants.

Moreover, when the paramount owner seeks to evict one who is entitled to the benefits of any of the covenants for title, he can by giving proper notice of the action to the party bound by the covenants and requiring him to defend them, relieve himself from the burden of proving the validity of his title. "The notice should be unequivocal, certain and explicit." ¹⁴¹

Lastly, may be mentioned briefly the remedies for infringing the agreements of covenantors. Formerly an action of covenant was sometimes made to serve as a bill in equity to which an equitable defense might be given, but so far as regards the instrument on which the action is founded, it is strictly an action at law under seal.¹⁴² An assignee or grantee may maintain an action of covenant against any of the prior grantors or assignors who have entered into a general warranty of title, whether he have a warranty or not to himself, against any of the prior grantors or

¹³⁹ *Wilson v. Cochran*, *Christy v. Reynolds*, both *supra* note 123; *Paul v. Witman*, 3 W. & S. 407 (Pa. 1842); *Fuhrman v. Loudon*, *Lighty v. Short*, both *supra* note 132; *Dobbins v. Brown*, *supra* note 43; *Cathcart v. Bowman*, *supra* note 23; *Murphy v. Richardson*, 28 Pa. 288, 292 (1857); *Beauplaud v. McKean*, *supra* note 1; *Knepper v. Kurtz*, *supra* note 40.

¹⁴⁰ *RAWLE*, *supra* at 318; *Williams v. O'Donnell*, *supra* note 117.

¹⁴¹ *Paul v. Witman*, *supra* note 139; *Bender v. Fromberger*, 4 Dall. 436, 437 (U. S. 1806); *Collingswood v. Irwin*, 3 W. 306, 310 (Pa. 1834).

¹⁴² *Lehigh Coal Co. v. Harlan*, 27 Pa. 429, 442 (1856).

assignors.¹⁴³ This rule is in harmony with the rule in all or most of the states.¹⁴⁴

As a covenant is under seal, an action must be brought thereon in the name of the covenantee,¹⁴⁵ in debt, or covenant.¹⁴⁶ But when the agreement has been altered by parol, transforming it into a new and independent one, then the proper action is *assumpsit*.¹⁴⁷ Said Chief Justice Gibson: "That covenant is not maintainable on a heterogeneous agreement as a common law remedy is most undoubted; and for the reason that a contract rests partly in writing and partly in parol."¹⁴⁸

A suit may be for the use of those beneficially interested.¹⁴⁹ In these cases the court controls the execution and applies the money in accordance with the agreement.¹⁵⁰ The action, when the agreement is thus made for the benefit of another, must be brought in the name of the party who made it, and not by the beneficiary.¹⁵¹ Thus covenant may be maintained for the purchaser of land by agreement under seal, by which the payment of the purchase-money is to be paid by the vendor to a third person—in the name of the vendor for the use of such person.¹⁵² Likewise if a railroad company has the right of way over mining lands and covenants with the owner that on notice it will change its location, a tenant of the owner may sue in the name of his landlord for a breach of the covenant.¹⁵³

An action for not performing an agreement under seal to convey land must be brought by the personal representative of the

¹⁴³ *Le Ray de Chaumont v. Forsythe*, *supra* note 13.

¹⁴⁴ *RAWLE*, *supra* at § 214.

¹⁴⁵ *De Bolle v. Pa. Insurance Co.*, 4 Wh. 68 (Pa. 1838); *Ardesco Oil Co. v. North American Oil Co.*, 66 Pa. 375 (1870).

¹⁴⁶ *McManus v. Cassidy*, 66 Pa. 260 (1870).

¹⁴⁷ *Vicary v. Moore*, 2 W. 451 (1834); *Vaughn v. Ferris*, 2 W. & S. 46 (1841); *Spangler v. Springer*, 22 Pa. 455 (1854); *Lawall v. Rader*, 24 Pa. 283 (1855); *Lehigh Coal Co. v. Harlan*, *supra* note 142; *McManus v. Cassidy*, *supra* note 146.

¹⁴⁸ *Vicary v. Moore*, *supra* note 147.

¹⁴⁹ *De Bolle v. Pa. Insurance Co.*, *Ardesco Oil Co. v. North American Oil Co.*, both *supra* note 145.

¹⁵⁰ *Ibid.*

¹⁵¹ *Strohecker v. Grant*, 16 S. & R. 237 (Pa. 1827).

¹⁵² *Campbell v. Shrum*, 3 W. 60 (Pa. 1834).

¹⁵³ *Mine Hill R. R. v. Lippincott*, 86 Pa. 468 (1878).

covenantor and not by his heir. He is also the proper party to bring an action on a lease made by his ancestor to recover rent. In *Watson v. Blaine*,¹⁵⁴ *B* sold to *D* a tract of land, and the question arose if a second tract was sold. The counter evidence of the second sale was the sale of it in several parcels to different persons without informing *D*. His administrator brought a suit against *B*'s executor to recover damages. Should *D*'s heir or his administrator bring the suit? Said Chief Justice Tilghman: "The administrator of *D*, I apprehend, and no other person. What other person can be entitled to an action? The contract was with the testator. The action for breach of contract is a personal action, which is transmitted to the personal representatives. The heir does not succeed to an action of this kind. There are contracts which belong to the realty, and run with the estate, and such descend to the heir. If the ancestor, for instance, make a lease, reserving rent, the rent which accrues after the death of the ancestor, is incident to the reversion, and goes to the heir, who may support an action on the lease made by his ancestor. So, covenants by a tenant for making repairs, or doing other things on the devised property, for the benefit of it, run with the land, and the person seised of the reversion may support an action for breach in his own time. But in the present instance, *D* was seised of no estate, and therefore no estate descended to his heir. There was no estate to which a covenant could be attached."

Lastly, a covenant in a deed, executed by virtue of a power in the will to carry out an agreement made by the testator, cannot be joined with a count against him on the testator's covenants.¹⁵⁵ And if a lessor and his sureties jointly covenant to pay rent, an action cannot be maintained against the sureties alone for rent which accrued under the lease.¹⁵⁶

¹⁵⁴ 2 S. & R. 131 (Pa. 1824).

¹⁵⁵ *Strohecker v. Grant*, *supra* note 151.

¹⁵⁶ *Phillips v. Bonsall*, 2 Binn. 138 (Pa. 1809); *Philadelphia v. Reeves*, 48 Pa. 472 (1865).